

No. 83-411

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In the Supreme Court of the United States

OCTOBER TERM, 1983

GULF OIL CORPORATION, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT*

**BRIEF FOR THE
FEDERAL ENERGY REGULATORY COMMISSION
IN OPPOSITION**

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QUESTIONS PRESENTED

1. Whether the court of appeals properly upheld orders of the Federal Energy Regulatory Commission adopting the implementing details of a refund-recoupment remedy, the overall scope of which had been fashioned by the Commission in earlier orders that had been sustained by the court of appeals.

2. Whether the court of appeals properly concluded that petitioner was not entitled to invoke the *force majeure* clause of its contract in the circumstances of this case.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a), as amended (Pet. App. 27a-30a), is reported at 706 F.2d 444. An earlier, related opinion is reported at 563 F.2d 588. The orders of the Federal Energy Regulatory Commission on the refund related issues (Pet. App. 55a-64a, 65a-90a, 91a-104a) are reported at 6 F.E.R.C. ¶ 61,040, 17 F.E.R.C. ¶ 61,264, and 18 F.E.R.C. ¶ 61,307. The Commission's order on the *force majeure* issue (Pet. App. 31a-52a) is reported at 18 F.E.R.C. ¶ 61,048. The Commission's order on rehearing of the *force majeure* issue (Pet. App. 53a-54a) is not yet reported. The initial decision of the Administrative Law Judge on the *force majeure* issue is reported at 11 F.E.R.C. ¶ 63,041.

JURISDICTION

The initial judgment of the court of appeals (Pet. App. 109a-112a) was entered on April 21, 1983. A revised judgment (Pet. App. 105a-108a) was entered on June 15, 1983, and a petition for rehearing was denied on that date (Pet. App. 113a-115a). The petition for a writ of certiorari was filed on September 12, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The pertinent provisions of the Natural Gas Act, 15 U.S.C. 717 *et seq.*, are set forth at Pet. App. 116a-121a. The pertinent provisions of the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, are set forth at Pet. App. 122a-124a.

STATEMENT

Section 7(c) of the Natural Gas Act, 15 U.S.C. 717f(c), empowers the Federal Energy Regulatory Commission (Commission)¹ to issue certificates of public convenience and necessity governing the sale and transportation of natural gas in interstate commerce. In 1964, the Commission issued a certificate to petitioner Gulf Oil Corporation authorizing Gulf to sell gas to the Texas Eastern Transmission Company under the terms of a 1963 contract between Gulf and Texas Eastern.

In 1971, Gulf applied to the Commission for permission to amend its certificate because it had mistakenly estimated the supply of one of its reserve fields. The Commission denied the application on the ground that Gulf's obligations under the contract and certificate were unconditional and not dependent on a specific source of gas. Beginning in 1973, Gulf's deliveries to

¹ References to the "Commission" are to the Federal Power Commission prior to October 1, 1977, and to the Federal Energy Regulatory Commission after that date.

Texas Eastern fell short of Texas Eastern's demands; beginning in 1974, Gulf's deliveries fell short of the quantities specified in the contract.

1. *Gulf I*

a. In 1976, the Commission concluded that Gulf had not complied with its certificate and contract obligations regarding gas delivery and, accordingly, it imposed performance and refund requirements on Gulf. The Commission ordered Gulf to deliver 625,000 Mcf of gas per day until it had delivered all the gas it had promised but failed to deliver to Texas Eastern. At the same time, to deal with Gulf's past defaults on its delivery obligations, the Commission ordered Gulf to "refund" monies to Texas Eastern (to be paid over to Texas Eastern's customers) under a formula that reflected an equitable estimate of the damages to those customers. The Commission also provided, however, that Gulf could recoup certain amounts paid in refunds as it made restitution of previous underdeliveries. *Gulf Oil Corp.*, 56 F.P.C. 2293, reh'g denied, 56 F.P.C. 3492 (1976).

b. The court of appeals affirmed the Commission's 1976 order. *Gulf Oil Corp. v. FPC*, 563 F.2d 588 (1977), cert. denied, 434 U.S. 1062 (1978). The court upheld the Commission's determination that Gulf had failed to comply with its delivery obligations, and it sustained the Commission's authority to establish a refund-recoupment plan as an "efficient, fair, and reasonable exercise of discretion" (*id.* at 607). The court explained (*id.* at 608) (footnote omitted):

The FPC was confronted in this case with a massive default on the part of Gulf, a blatant breach of the warranty on the basis of which Gulf was awarded its certificate. * * * In short, the Commission was justified in believing that Gulf needed a reasonable, external prod to ensure its compliance with the Commission's order.

The refund-recoupment order also serves two other important purposes. First, by requiring that Gulf pay a refund on every occasion in the future that it underdelivers, the order discourages non-compliance. Second, by reducing the profits Gulf achieved by its past derelictions, Gulf and other gas producers are put on notice that nothing is to be gained by failing to timely comply with their certificates of public convenience.

The Court also affirmed "the Commission's order that the refunds include a component of interest, designed to compensate the customers of Texas Eastern for the loss of the time value of the additional money they paid for natural gas due to Gulf's default" (563 F.2d at 609), and it rejected Gulf's challenge to the rates of interest set by the Commission (*id.* at 610 n.27).

2. *Gulf II*

a. The court of appeals' affirmance of the Commission's orders in *Gulf I* did not end the proceeding. Rather, "[t]he court left to the Commission's determination the details of the refund-recoupment plan" (Pet. App. 7a). In carrying out this responsibility, the Commission divided the case into two separate components, one relating to the mechanics of implementing the refund-recoupment scheme, and the other relating to Gulf's contentions that certain deliveries had been delayed by events encompassed within the *force majeure* provision of the contract.

(i) *The Refund Plan*

The Commission approved the establishment of escrow accounts (Pet. App. 75a-81a) and determined that Gulf should deposit into them the recoupable corpus plus interest. The Commission further determined that the customers should receive interest computed according to the Commission's general interest regulations—*i.e.*, nine percent simple interest from Decem-

ber 15, 1976 to October 1, 1979 and, after that date, the "average" prime rate compounded quarterly (*id.* at 84a-85a).² The Commission pointed out on rehearing that its 1976 order, which had been affirmed by the court of appeals, provided that interest would accumulate at the general rate provided for under Commission regulations. Since the Commission had amended the general interest rate regulations to raise such rates, the Commission calculated Gulf's interest obligations accordingly. Pet. App. 93a-95a.

In addition, the Commission delineated the amount of the refund Gulf could recoup from the customers upon performance of its delivery obligations. Specifically, the Commission held that, on delivery of the gas, Gulf could recoup a sum representing principal and interest until December 15, 1976, the date its delivery obligations commenced under the Commission's rulings; the Commission held, however, that all interest accumulating from December 15, 1976 until the date Gulf fully complied with the obligations of the Commission's 1976 orders was not recoupable (Pet. App. 81a-83a). Thus, the customers were entitled to retain the "time value" of the refund for all periods of delay after December 15, 1976. The Commission explained, in its order on rehearing, that the refund scheme was designed to compensate the customers for the time the company took to rectify its default and to encourage Gulf to move with dispatch in complying with its delivery obligations. In the Commission's view, permitting Gulf to recoup interest after December 15, 1976 would defeat those goals. Pet. App. 96a-98a.

(ii) *Force Majeure*

Although both the Commission and the court of appeals in *Gulf I* had rejected Gulf's claim that the opera-

² See *United Gas Pipe Line Co. v. FERC*, 657 F.2d 790 (5th Cir. 1981) (affirming use of the prime rate in refund situations).

tion of the *force majeure* clause of its contract³ excused performance of its certificate and contract delivery obligations, the Commission had indicated that it would permit Gulf to reduce the amount of the required refund by the value of gas the delivery of which was delayed by events amounting to *force majeure*. 56 F.P.C. at 2307; *id.* at 3505. Accordingly, after the court of appeals affirmed the Commission in *Gulf I* and this Court denied certiorari, the Commission set the *force majeure* issue for hearing (Pet. App. 61a).

Following the hearing, at which Gulf presented evidence on alleged *force majeure* events, the Administrative Law Judge held that Gulf had not met its burden of proof under any interpretation of *force majeure*. He therefore denied Gulf any reduction in its refund obligation due to claimed *force majeure*. 11 F.E.R.C. ¶ 63,041, at 65,269-65,271.

The Commission reversed (Pet. App. 31a-52a). At the outset, it stressed that the dispositive issue was "not whether the *force majeure* provision of the warranty contract excuses Gulf's performance * * * [but] * * * whether Gulf should be required to refund, subject to a recoupment mechanism, money attributable to gas Gulf would have delivered * * * except for *force majeure*" (*id.* at 40a). The Commission held that, whatever else might be said of the reach of a *force majeure* clause in other circumstances, in this case the clause could relieve Gulf from the refund remedy but not from its ultimate delivery obligations (*id.* at 42a-44a). Thus, it was the Commission's judgment that "*force majeure* volumes are not forgiven or permanently excused from

³ The *force majeure* clause is set out in full at Pet. App. 11a n.8. As here relevant, the clause excuses performance in various disaster situations, such as floods and accidents, but specifically excludes "any cause which by the exercise of due diligence the party claiming force majeure is able to overcome" (*ibid.*).

delivery. They merely reduce the refund obligation to the extent *force majeure* delayed delivery" (*id.* at 44a).

Turning to the evidence submitted by Gulf on this issue, the Commission found that various *force majeure* events alleged to have occurred (*i.e.*, a hurricane, broken pipes and shutdowns), had in fact occurred and had made gas unavailable (Pet. App. 48a-50a). Accordingly, the Commission excused Gulf from the refund remedy as to those volumes (*id.* at 52a).

b. The court of appeals affirmed in part and reversed in part (Pet. App. 1a-26a). The court summarily affirmed the refund-recoupment orders without discussion (*id.* at 9a). The court reversed the Commission, however, with respect to the *force majeure* issue (*id.* at 17a-26a). The court first held (*id.* at 18a-23a) that the Commission had erred as a matter of law as to the proper scope of a *force majeure* clause in a warranty contract where, as here, the seller warrants that it will "have a specific quantity of gas available daily from an unidentified source of supply" (*id.* at 20a). In the court's view (*id.* at 22a),

in order to invoke the use of *force majeure* as an excuse under the warranty contract, Gulf as the nonperforming party must show [not only] that * * * the events which delayed its performance were unforeseeable and infrequent [but also] that it had available at the time of their occurrence more than the maximum warranted quantity of gas. This means that it must show that the availability of the gas as well as its delivery of it was affected by the occurrence of a *force majeure* event.

The court further held (*id.* at 23a-26a) that Gulf had failed to meet its burden of showing that it exercised due diligence in seeking to overcome the effects of *force majeure* events and that, therefore, the Commission's order on the *force majeure* issue was not supported by substantial evidence.

ARGUMENT

The decision below does not depart from the rulings of this Court, nor is there a conflict among the circuits on the issues raised by the petition. The issues in this case are essentially fact-bound. Consequently the case does not warrant review by this Court.

1. The basic premise underlying petitioner's challenge to the refund-recoupment remedy fashioned in *Gulf II* is that the Commission substantially deviated from its earlier orders, as affirmed by the court of appeals in *Gulf I*. Petitioner's challenge falls with its premise.

In *Gulf I*, the Commission determined that Gulf had violated its certificate obligation to deliver a fixed quantity of gas. At that time, the Commission devised and approved the framework of the refund-recoupment remedy, which was designed to provide an incentive for Gulf to comply with the certificate while compensating Texas Eastern's customers for Gulf's violations. In a thorough opinion, the court of appeals affirmed the Commission's action. In *Gulf II*, which is the proceeding under review, the Commission simply fleshed out the details of its previously prescribed remedy. Once again, the court of appeals affirmed, this time summarily. In fact there is no substance to the argument that the Commission in the instant proceeding "entered new orders which change drastically the substance" of its 1976 orders (Pet. 9).

a. Petitioner contends (Pet. 9-10) that the Commission, in the orders under review, reneged on a provision in its 1976 orders that allegedly would have permitted Gulf to reduce its initial refund payments if it could show at a hearing that the actual individual damages suffered by the customers were less than the refunds due under the formula established in the Commission's orders. On the contrary, the Commission in 1976 explicitly rejected that approach, holding that "[c]ondi-

tioning relief on actual proof of the myriad effects of Gulf's non-delivery could lead to endless proceedings" (56 F.P.C. at 2300). In the Commission's view, therefore, expedition in granting relief was the order of the day.⁴ The court of appeals endorsed that position in *Gulf I* (563 F.2d at 608, 609); the Commission reaffirmed that position in the instant orders (Pet. App. 71a-73a); and the court evidenced its continued support of that position by summarily affirming the provisions of the refund-recoupment remedy challenged here. It is too late in the day for petitioner to resurrect a challenge long put to rest.

b. Similarly unpersuasive is petitioner's argument (Pet. 10, 11-12) that the Commission exceeded its authority in fashioning the refund-recoupment plan so as to permit the customers to keep the post-December 15, 1976 interest. The Commission made clear in its 1976 orders that the refund remedy serves two distinct purposes: (1) it requires Gulf either to deliver the gas it had warranted or to pay the customers an equivalent sum of money; and (2) in any event, it requires Gulf to compensate its customers for the time needed to comply with the Commission's orders (56 F.P.C. at 2300; *id.* at 3499). In *Gulf I*, the court of appeals expressly rejected Gulf's claim that the Commission's refund orders exceeded its authority under the Natural Gas Act (563 F.2d at 604-608). The court also recognized that if Gulf fully complies with the Commission's orders by delivering all of the gas that it had warranted under the contract, it would "recoup every dollar that it has been

⁴ The Commission did state (56 F.P.C. at 3498-3499) that, if, in distributing the refund, it were found that individual damages were less than Gulf's payment, Gulf would be reimbursed. If, on the other hand, actual damages exceeded the refund payment, the customer could sue Gulf in court to recover additional damages.

ordered to refund," with "a loss * * * of nothing more than the time value of the money" (*id.* at 607).

In the instant proceedings, the Commission merely undertook to implement its earlier orders, which, as Gulf admits (Pet. 11), the court of appeals had affirmed "without qualification." The Commission's 1976 orders directed Gulf to rectify its violations of the certificate by December 15, 1976 (56 F.P.C. at 2307). Because Gulf did not comply with that directive, any interest accumulated after that date properly belongs to the customers as compensation for Gulf's delay. On the other hand, should Gulf ultimately deliver all of the gas that it is required to deliver under the contract and certificate, it would recoup principal, and also interest from the date of its breach of the certificate until December 1976, the date that it was compelled to institute delivery pursuant to the Commission's orders.⁵

c. Petitioner claims (Pet. 12-14) that it did not receive adequate notice of the higher interest rates for the post-October 1979 period and that the Commission therefore erred in applying those rates to this case. In its 1976 order on rehearing, the Commission explained (56 F.P.C. at 3500-3501) that, in adopting the seven and nine percent interest rates for Gulf's refund payments, the Commission was simply applying "current conditions in the money market." Moreover, on review, the court of appeals in *Gulf I* affirmed those rates by pointing to the "money market" as a proper index for determining interest (563 F.2d at 610 n.27). It follows, then, that when the Commission amended its general interest rate regulations to reflect fluctuations in the money market, the rate in Gulf's case properly changed as well.⁶

⁵ The cases cited by petitioner in support of its argument (Pet. 12) are inapposite, since in the instant case the Commission did not retroactively change an approved rate.

⁶ Indeed, the Fifth Circuit has held that the Commission *must* use the general interest rate in refund cases, "absent a

2. With regard to the *force majeure* issue, the Commission is of the view that the court of appeals misconstrued the Commission's decision on *force majeure*. The Commission did not excuse Gulf from performance of its contract delivery obligations; rather, the Commission simply held that, in those situations in which the *force majeure* clause was properly triggered, the refund-recoupment remedy would not be applicable. In these circumstances, therefore, we believe that the court of appeals' reliance on the common law *force majeure* cases involving nonperformance was misplaced.⁷ Nevertheless, we recognize that the court's ruling is narrow in reach because it is limited to the type of *force majeure* clause contained in the Gulf contract. If a *force majeure* clause in another contract were drafted to define the parties' obligations more explicitly, a different result might ensue.

Moreover, even if the Commission is correct in its view that the court erred in its reading of the Commission's *force majeure* decision, Gulf would still not prevail unless it could show not only a causal connection between each claimed *force majeure* event and the undelivered volumes, but also that it exercised due diligence with respect to both availability and deliverability. Here, the court of appeals found that Gulf's evidence failed to establish the requisite due diligence (Pet. App. 23a-26a). Because the ultimate disposition of the *force majeure* issue thus turns on an assessment of the particular facts of this case, we submit that review by this Court is not warranted.

clear and acceptable explanation for its departure." *Shell Oil Co. v. FERC*, 664 F.2d 79, 82 (5th Cir. 1981).

⁷ Because the commission did not excuse Gulf from performance of its contractual obligations, this case is distinguishable from the "take or pay" situations cited by petitioner (Pet. 20-21 & n.13). Moreover, the reasons behind nonperformance in those cases are not necessarily similar to those involved here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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